89-470

No. 89-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

SOUGHIK KAYZAKIAN,

Petitioner,

v.

CHARLES R. BUCK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William H. Hurd
Counsel of Record
2803 McRae Road
Richmond, Virginia 23235
(804) 272-2006

John Paul Woodley, Jr.
Of Counsel
WOODLEY, SIMON & WOODLEY
1 North Fifth Street, Suite 301
Richmond, Virginia 23219

Counsel for Petitioner

32 pp

QUESTION PRESENTED

Does the doctrine of res judicata preclude a plaintiff from litigating, in a second lawsuit, claims that did not arise until after the complaint in her first lawsuit was filed, especially when a) the trial court denied her request to add the new claims to her first lawsuit through a supplemental complaint, and b) in so doing, the trial court ruled that those new claims would not be barred by res judicata?

PARTIES TO THE PROCEEDING

Petitioner Soughik Kayzakian was the Plaintiff in the District Court, and the Appellant in the Court of Appeals for the Fourth Circuit.

Respondents Charles R. Buck, Theodore Thornton, Alp Karahasan, Sandra Leichtman, Bruce L. Regan, Thomas F. Krajewski, Jonathon D. Book, Peter T. Pomilo, Irfan S. Esendal, Reza G. Bassiri, Duesdedit Jolbitado, Philip P. Townsend, Randy Roberts, Daniel R. Malone, Jae Park, Ethel Mattegunta, and Springfield Hospital Center, were the Defendants in the District Court, and Appellees in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-

SOUGHIK KAYZAKIAN,

Petitioner,

v.

CHARLES R. BUCK, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Soughik Kayzakian petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENT BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit (App. 1a) was entered on December 20, 1988. The Opinion is not reported. The Opinion of the United States District Court for the District of Maryland of September 23, 1987, granting the Respondents' motion to dismiss the complaint (App. 10a), is not reported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 20, 1988. A timely Petition for Rehearing was granted by Order of March 29, 1989. The Order of March 29, 1989, was withdrawn as improvidently granted, and the petition for rehearing was denied by Order dated June 19, 1989 (App.7a).

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

Relevent portions of the provisions of Title 42, United States Code and of the Federal Rules of Civil Procedure appear in the Appendix, at 109a.

STATEMENT OF THE CASE

This case involves the preclusive effect of a dismissal with prejudice of the first of two cases brought by the Plaintiff, Soughik ("Sonia") Kayzakian, against her one-time employer, Springfield Hospital Center, and various other defendants sued in both their individual and official capacities. The first case, styled Kayzakian v. Krajewski ("Kayzakian I"), was filed on October 27, 1982 (App. 16a) and amended immediately thereafter, on November 29, 1982, to make a technical correction in her allegation that

due process was denied. (App. 53a). At the time of filing Kayzakian I, the Plaintiff was still an employee of Springfield Hospital Center; but before the case could be resolved, she was forcibly terminated from her employment in July or August of 1983 (App. 55a) and suffered other new injury.

Desiring to resolve her claims in a single lawsuit, the plaintiff sought to supplement her Complaint to include allegations about her termination and the other injuries she had suffered after October 27, 1982. She also sought to expand the scope of her Complaint so as to allege reprisals against her because of her exercise of free speech with respect to the treatment given an additional thirty four identified patients of Springfield Hospital Center. The district court did not allow her to do so. Said motion and denial were initially made during a telephone conference with the court on October 17, 1982,

and were re-affirmed in hearings on December 9 and 12, 1983; and in a Memorandum and Order dated February 23, 1984. (App. 103a)

The court confirmed the limited nature of the free speech/reprisal issues present in Kayzakian I by granting the Defendants' Motion in Limine to prevent Kayzakian from introducing any evidence concerning Springfield Hospital patients other than Messrs. Bernard Finkelstein and Igor Frank. These were the two patients named in the Kayzakian I complaint whose medical care was the subject of Kayzakian's initial free speech complaints and subsequent reprisals. (App. 26a).

Notwithstanding these decisions, the district court ruled that the matters with which the Plaintiff sought to supplement her complaint would not be precluded by the doctrine of res judicata, and that a second lawsuit would be in order if she so chose. (App. 105a). Wishing to

pursue the matter of her termination, which was the most substantial part of her claims, the plaintiff then advised the court that she did not wish to proceed with Kayzakian I, whereupon the Court issued a Memorandum and Order stating that the case would be dismissed, and reserving judgment on whether said dismissal would be with or without prejudice. In said Memorandum and Order, the court expressly recognized that a new suit would be filed by Kayzakian and granted her the opportunity to do so. (App. 105a).

The plaintiff then did what the district court ruled she had the right to do. She brought a second lawsuit, alleging a wrongful termination as well as other injuries which occurred after the filing of Kayzakian I and/or which she was not allowed to add to her Complaint in that action.

These included the following:

(a.) Defendant Park falsely accused the plaintiff in public of being unable to communicate after October 12, 1982.

(b.) Defendant Book made false statements in the plaintiff's Annual Efficiency Report and gave her an unsatisfactory rating which was unjustified by her work record and performance, on or about January 27, 1983.

(c.) Defendant Roberts harassed the plaintiff in February, 1983 by questioning her in his office and by subjecting her to unusual scrutiny.

(d.) Defendant Roberts instituted novel restrictions on the plaintiff's practice on or about March 14, 1983, and imposed a new and unreasonable requirement on plaintiff to become licensed within one year.

(e.) Defendants Roberts and Malone harassed the plaintiff in the Spring and Summer of 1983 with phony supervisory sessions.

(f.) Defendants Buck and Thornton permitted all these actions and did not properly supervise their subordinates to prevent these actions from taking place.

(g.) The other defendants participated as co-conspirators in these activities, aiding, abetting, procuring and/or encouraging these actions.

(h.) Because the plaintiff reported medical negligence by Springfield Hospital physicians, with respect to the thirty four newly identified patients, the defendants conspired to vilify and systematically harass the plaintiff, in order to force her resignation, and harm her professionally.

(i.) The defendants' actions resulted in the plaintiff's forced resignation from her position in July, 1983.

This case was styled Kayzakian v. Buck ("Kayzakian II"). Thereafter, the district court decided that the dismissal of Kayzakian I was to be with prejudice, and the case of Kayzakian II came before the Court on the defendants' plea of res judicata. (App. 10a). Notwithstanding the previous ruling in Kayzakian I, the District Court ruled that all of those new claims should have been included in the first lawsuit, and that they were now barred by the doctrine of res judicata. (App. 10a-15a). Thus, the plaintiff has been caught between two inconsistent rulings of the District Court, and has been deprived of her day in court.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law which has not been, but should be, decided by this Court. When a plaintiff sues her defendants in a second

lawsuit, on claims not alleged in the first action, three fact patterns are possible:

a) the second case involves facts which occurred before the complaint in the first case was filed.

b) the second case involves facts which did not occur until after judgment was rendered in the first case.

c) the second case involves facts which occurred after the complaint was filed in the first case but before judgment was rendered in that case.

In the first and second fact patterns, the federal doctrine of res judicata is reasonable well-established. In the first pattern, the second lawsuit is barred; in the second pattern, the second lawsuit is allowed. There is, however, no clearly-enunciated federal doctrine governing the third fact pattern.

Under Rule 15(d), Fed. R. Civ. P., a plaintiff may seek permission from the trial court to file a supplemental

complaint setting forth matters which occurred after the initial complaint was filed. Where such permission is granted, the newly-alleged claims are adjudicated along with the initial claims so as to be barred from a second lawsuit by the doctrine of res judicata.

But where the trial court denies permission to supplement the complaint, the status of the plaintiff's new claims is unclear. In the present case, the courts below have ruled that those new matters are barred by the doctrine of res judicata, but these rulings are not supported by precedent or authority. This result is patently unjust in that it unfairly denies a plaintiff her day in court on claims arising after filing a complaint in a civil action, and accords defendants an unwarranted window of immunity from liability for wrongful acts. This petition should be granted so that this Court may clearly establish

that the federal doctrine of res judicata does not require this unjust result.

I. THE DOCTRINE OF RES JUDICATA DOES NOT BAR THE PLAINTIFF FROM FILING A SECOND LAWSUIT TO PURSUE CLAIMS THAT COULD NOT HAVE BEEN ALLEGED IN THE FIRST ACTION.

The trial court ruled that all of the plaintiff's claims were barred by the doctrine of res judicata, even though some of those claims--the ones the plaintiff now seeks to litigate--did not arise until after the complaint is the first case was filed. This ruling is not grounded in sound law or sound policy. Surely a plaintiff is not required to wait for her wrongdoer to do everything he might want to do to her before bringing an action against him. On the contrary, she may bring suit on the acts already committed and the injury already suffered. If additional tortious acts are committed and injury results, she has two choices: (a)

she may move directly to file a separate lawsuit based on the additional claims, or (b) under Rule 15(d), F.R.Civ.P., she may seek to file a supplemental complaint adding the new tortious acts to the suit she has already filed. If this motion is denied--and the trial court has broad discretion on such a motion--she may then bring a separate suit on the additional wrongs. This second course of action is precisely what the plaintiff in this case has sought to do.

This position is supported by an analysis of the three fact patterns into which cases involving a res judicata claim ma be grouped. In the first category of cases, plaintiff files a second lawsuit based on facts that had already occurred before the first lawsuit was filed. In this category of cases, the doctrine of res judicata is properly applied. This is not, however, the situation with the case at bar.

In the second category of cases, the plaintiff files a second lawsuit based on facts that did not occur until after

judgment in the first case was entered. In this category of case, the doctrine of res judicata does not apply. The case at bar does not fall within this factual pattern either.

In the third category of case--the one applicable to the case at hand--the plaintiff files a second lawsuit based on facts that occured after the complaint was filed in the first action but before judgment was rendered in that case. The issue here is whether such a category of case should be treaated like the first category and barred by res judicata, or like the second category and not subject to such a ban. An analysis of the reasons supporting the results shows that the third fact pattern is closely akin to the second, and that res judicata should not apply.

A leading case involving the second fact pattern Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955). In Lawlor, the plaintiffs brought an antitrust action in 1942 regarding an alleged monopoly in the distribution

of motion picture advertising materials. This suit was dismissed with prejudice in 1943, pursuant to a pre-trial settlement. In 1949, the plaintiffs, alleging new acts in furtherance of the same monopoly sued on in 1942, brought another antitrust suit against the same defendants and five other conspirators. The district court dismissed the second suit as barred by the doctrine of res judicata, and the court of appeals affirmed this dismissal on grounds that the two suits were based on "essentially the same course of wrongful conduct." 211 F.2d at 936. The Supreme Court granted a writ of certiorari and reversed.

Critical to the Supreme Court's analysis in Lawlor was the fact that the conduct complained of in the second suit was subsequent to the 1943 judgment in the prior suit. 349 U.S. at 328. The Court reasoned that to apply the doctrine of res judicata to bar an action based on these subsequent acts "would in effect confer on them a partial

immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata." 349 U.S. at 329; emphasis added.

Strong policy considerations dictate that the rule in Lawlor be extended to cover those claims that arise between the initial complaint in the earlier action and the judgment in that action. This is especially true where, as here, the plaintiff sought to add those matters as a supplemental complaint under Rule 15(d), but was denied on objection by the defendant.

At the time of the filing of the complaint in a civil action, the defendant is put on notice of the claims alleged against him. At that time, he can begin to prepare his defense, plan his discovery strategy and secure witnesses for trial. He is entitled to reasonable certainty in the claims against him and would be abused if those claims were constantly multiplied by supplemental allegations

which required new discovery with the attendant trial delay. On the other hand, a plaintiff who files a civil action may suffer further wrongs at the hands of the defendant after the complaint is filed. The pendency of a civil action should not create a zone of immunity within which the defendant may harm the plaintiff with impunity.

Rule 15 (d) provides the district court with discretion to permit a plaintiff to plead the new wrongs in a supplemental complaint, and allows the court to set such terms as are just in permitting the supplemental pleading. There are, of course, many reasons why a court may not wish to allow supplemental pleading in a given action. But to disallow such a pleading should not mean that those unlitigated claims would be barred by res judicata.

In Kayzakian I, the parties had already conducted substantial discovery and litigated several pre-trial motions when the Plaintiff was forced to resign her position on

August 13, 1983. Given the objections of the defendants, the district court was not inclined to allow a new round of discovery or to continue the trial date, and so declined plaintiff's motion. The plaintiff does not take issue here with that decision. But, if the subsequent final judgment in Kayzakiaan I precludes subsequent litigation of those claims which arose after the Kayzakian I complaint was filed, the effect would be to confer on the defendants the same immunity which the Supreme Court condemned in Lawlor.

The better rule is the one stated by the district court on December 3, 1983: the defendants can object to the allowance of the supplemental complaint, but must understand that, if they do and the court forbids supplementation of the complaint, the subsequent judgment is not res judicata for the acts which would have been alleged in the supplemental complaint. The choice rests,

to some degree, with the defendant. He can accede to the supplementation and try all the claims in one action or object and endure the possibility of a later action based entirely on his post-complaint behavior. The refusal of the plaintiff's motion to supplement is consistent with the broad discretion allowed in a trial court under Rule 15(d). But given that decision, the later ruling that those same matters are barred in Kayzakian II is a manifest injustice.

Although there is a paucity of reported cases dealing with the third fact pattern, the cases that are available give added support to the plaintiff's position that the third fact pattern should be treated like the second, thereby allowing the plaintiff to bring a second lawsuit with respect to the allegations which occurred subsequent to the initial complaint in Kayzakian I. The case of Page v. United States, 729 F.2d 818 (D.C. Cir. 1984), filed in 1980, was the second case brought by the plaintiff under the Federal

Tort Claims Act alleging that the Veterans Administration subjected him to harmful drugs during a prolonged course of treatment. The first case, Page I, was filed in 1972 and alleged a harmful course of treatment between 1961 and 1972. This case was dismissed by the trial court in 1973. 729 F.2d at 819, n.6. The second case, Page II, alleged a harmful course of treatment between 1961 and 1980. The trial court dismissed the entire second case on grounds of res judicata. On appeal, the circuit court agreed with the district court that the order dismissing Page I was res judicata as to the Veterans Administration's treatment activties between 1961 and 1972, but overruled the district court's decision insofar as it dismissed Page's claim for treatment activities between 1972 and 1980. As the court noted, "Since Page's 1972 action obviously could not have asserted claims based on facts that were not yet in existence, the dismissal of that action cannot be res

judicata of Page's complaint respecting VA's conduct from 1972 to 1980." 729 F.2d at 820. What is most significant about this ruling is that the claims on which the cirucit court allowed Page II to proceed included claims for activities falling between the 1972 commencement of Page I and its 1973 dismissal. Thus, instead of extending the bar res judicata forward to the time of judgment, the circuit court limited the application of the doctrine to the time of the filing of the initial complaint.

The plaintiff's position also finds support in New Amsterdam Casualty Company v. Waller, 323 F.2d 20 (4th Cir. 1963), cert. den. 376 U.S. 963 (1964). In that case, the plaintiff sought to supplement the complaint to include fraudulent transfer of a debtor's property to the defendant which took place after the complaint was filed but before the judgment. This motion was denied, and the circuit court held that the motion should have been granted. In

so ruling, the circuit court was not concerned that the plaintiff's claims to such transfers might be extinguished by that judgment. On the contrary, the court was concerned that the plaintiff would have to commence an entirely new proceeding to litigate those claims. 323 F.2d at 28, 29. If matters which could only be raised by a supplemental complaint were extinguished by the judgment in the first case, the "cost, delay and waste of separate actions" that concerned the court in New Amsterdam would not arise, because any such action would be barred by res judicata.

II. THE PRESENT CASE IS NOT BARRED BY RES JUDICATA BECAUSE THE DISTRICT COURT IN KAYZAKIAN I RULED THAT IT WOULD NOT BE.

The transcript of the pre-trial hearing held in Kayzakian I on December 9, 1983 (App. 16a - 31a) clearly shows that the district court was aware of the attempts by the plaintiff to supplement her complaint to include her forced termination and the other matters occurring after

the complaint in Kayzakian I was filed. At the insistence of the defendants, who complained that adding those allegations would require further discovery and possible trial delay, the district court denied the plaintiff's request to supplement her complaint. In so doing, however, the district court cautioned the defendants that those matters not included in Kayzakian I would not be barred from future litigations by res judicata:

> THE COURT: No, I do not think that this -- this is not a case in which Dr. Kayzakian has alleged wrongful discharge. This is a case in which Dr. Kayzakian has complained that she has been discriminated against.
>
> Unless she is complaining that she was discriminated against because of something that she said in connection with those conditions, the answer is that I will grant the Motion in Limine.
>
> MR. MARR: Well, Your Honor --
>
> THE COURT: Let's move, Mr. Marr.

MR. MARR: Okay, but you've overlooked a very important detail that's in the record that I want to bring your attention to.

THE COURT: What is that?

MR. MARR: Suit was filed before she terminated her employment at Springfield and one of the things she wants to do is amend her suit to include her forced termination as a retaliation.

THE COURT: And the answer is that that motion to amend has been denied.

MR. MARR: I understand that, Judge, but I just wanted to put everything in context.

THE COURT: If you want to bring a separate lawsuit with regard to those matters, I think, Ms. Meredith you have to understand that those would not be res judicata.

(App. 25a, 26a; emphasis added.)

This is a rule of simple fairness. The defendants could have accepted without objection the plaintiff's supplementing of her complaint, and settled the entire matter at one time. They elected not to do so, and the district court went along with their election. Now,

however, having enjoyed the benefit of that ruling, the defendants seek to enjoy as well the benefit of precluding litigation of these issues in a separate action just as if they had been included in Kayzakian I from the beginning. This is not fair and should not be permitted.

Indeed, even if these were not supplemental matters, the decision by the district court to reserve the plaintifff's right to bring a second action should be binding. The reservation by a court of a plaintiff's right to bring a second action is squarely addressed in the official Comment to Section 26 of the Restatement (Second) of Judgments:

> A determination by the court that its judgment is "without prejudice" (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should primarily be given effect in the second action.

Comment C; emphasis added.

Taking the court at its word, the plaintiff elected not to go forward with the trial of Kayzakian I, even though, by so doing, she risked a dismissal with prejudice of the claims in Kayzakian I. It was a risk she was willing to take because the most important concern to her was the issue of her termination; she knew that she could still litigate that issue in a second lawsuit because the district court had told her so.

Unfortunately, when Kayzakian II came before the district court for a ruling on the Defendants' motion to dismiss, the trial court overlooked its earlier ruling about res judicata. Thus, the plaintiff has been caught between two inconsistent rulings and, as a reuslt, has been deprived of her day in court. This injustice can only be corrected by granting her petition for writ of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM H. HURD

Counsel of Record
2803 McRae Road
Richmond, Virginia 23235
804/272-2006

JOHN PAUL WOODLEY, JR.
Of Counsel

WOODLEY, SIMON & WOODLEY
1 North Fifth Street, Suite 301
Richmond, Virginia 23219
804/783-8282